

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 05-44481
DELPHI CORPORATION, et al, . New York, New York
Wednesday, March 22, 2006
Debtors. . 2:18 p.m.
.

TRANSCRIPT OF SECTION 1102(a)(2) EVIDENTIARY HEARING
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

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1 I think others involved in this matter will have an
2 opportunity to weigh in after the fact and Appaloosa, as Mr.
3 Rosenberg pointed out, will have that opportunity, too, as
4 would Brandes, given its substantial resources.

5 I think with that, Your Honor, I'll step down and
6 let Ms. Leonhard make her remarks. Again, I would propose
7 granting the motion.

8 THE COURT: Okay.

9 **CLOSING ARGUMENT FOR THE U.S. TRUSTEE**

10 MS. LEONHARD: Good evening, Your Honor. Alicia
11 Leonhard for the United States Trustee.

12 Last, but not least, Your Honor, the United States
13 Trustee joins in the comments and the arguments of the
14 objectors and requests that the Court deny the motion. Thank
15 you very much.

16 THE COURT: Okay. All right. I'll take a five-
17 minute break and then I'll be back. Well, I'll be back at
18 6:15.

19 (Recess taken at 6:01 p.m.)

20 THE COURT: Please be seated.

21 I have in front of me a motion by Appaloosa
22 Management, LP, a substantial shareholder of the parent
23 Delphi entity, for the appointment of an official committee
24 of equity security-holders under Section 1102(a)(2) of the
25 Bankruptcy Code.

1 The motion is opposed by the debtors, the Official
2 Unsecured Creditors' Committee, the agent for the pre-
3 petition lenders, and the United States Trustee.

4 It has been joined in by another large and
5 sophisticated management company, Brandes, which unlike
6 Appaloosa, was a pre-petition holder of the debtor's equity
7 interests and represents to the Court that it has, under
8 management with authority to vote, again, a substantial stake
9 in the debtor's equity interests. I believe, if you add the
10 two of them together, they own or control approximately
11 fifteen or sixteen percent of the outstanding shares.

12 Those shares are widely held. There was no
13 testimony on this point, but I believe the record is clear
14 that there are approximately 300,000 shareholders of the
15 publicly traded equity interests. In light of that fact, I
16 believe that it is relevant that the SEC has not taken a
17 position on this motion. There were perhaps contrary
18 representations made to the Court as to why the SEC had not
19 done that, made by counsel to the U.S. Trustee on the one
20 hand, saying that the SEC did not support the motion; and by
21 counsel for Appaloosa, saying the SEC did not support the
22 motion, absent a showing, which it was not taking a position
23 on -- that is, that the SEC was not taking a position on,
24 with regard to whether the debtors at this point are
25 insolvent.

1 This is an important motion because it affects the
2 cost of this case, both directly--that is, the cost of an
3 equity committee and its professionals if I grant the motion--
4 -as well as indirectly, in connection with both the cost of
5 the estate and other estate-compensated professionals,
6 including the Creditors' Committee, in dealing with
7 litigation and other matters raised by an equity committee;
8 and then, in addition, also indirectly, in respect of
9 potential delay that the existence of an equity committee
10 might cause at various stages in the case.

11 Because of its importance, and because of the desire
12 by all parties, at least as initially expressed by all
13 parties, including Appaloosa, to have this matter heard and
14 decided by me quickly, so that if I rule in favor of an
15 equity committee, an equity committee could be appointed
16 quickly before passage of much more time in this case, I have
17 decided to rule from the bench.

18 As I often do with long bench rulings, however,
19 particularly where I cite extensive case law, I reserve the
20 right to correct the ruling based on my review of the
21 transcript.

22 This is a core proceeding under the Bankruptcy Code,
23 as it deals with a committee's appointment under the Code.
24 And one begins, as one must, with the statute, which provides
25 at Section 1102(a)(2) that:

1 "On request of a party in interest, the Court may
2 order the appointment of additional committees of
3 creditors or of equity security-holders, if
4 necessary to assure adequate representation of
5 creditors or of equity security-holders. The United
6 States Trustee shall appoint any such committee once
7 the Court has ordered the appointment."

8 It's well recognized that there is no statutory test
9 for "adequacy of representation," as used in Section
10 1102(a)(2). See, for example, In Re: Johns Manville
11 Corporation, 68 B.R. 155 (SDNY 1986), appeal dismissed 824
12 F.2d 176 (2d Cir. 1987).

13 In light of the absence of a statutory definition of
14 "adequacy of representation," and in light further of the
15 fact that the statute says the Court "may" order the
16 appointment of an additional committee besides the Official
17 Creditors' Committee, the courts have made such
18 determinations on a case-by-case basis in the exercise of the
19 Bankruptcy Court's discretion. See, again, In Re: Johns
20 Manville, 68 B.R. 155, as well as In Re: Becker Industries
21 Corporation, 55 B.R. 945, 948, (Bankruptcy, SDNY 1985), for
22 lists of the factors that the courts have employed in
23 exercising their discretion on a case-by-case basis.

24 I should further note that the case law is clear
25 that the burden of showing a lack of adequacy of

1 representation is upon the movant. Again, see In Re: Johns
2 Manville Corporation, 68 B.R. 155.

3 The factors that the Court is to consider on a case-
4 by-case basis are, by this time, fairly well established,
5 although I should say first and foremost, again, they are
6 merely factors informing the Court's discretion. It is not a
7 litmus test, and no particular factor's absence precludes the
8 appointment of a committee; and, conversely, although if all
9 the factors were present, one would assume a committee would
10 be appointed, the Court still has discretion under the
11 statute, in light of other factors that might be present and
12 relevant, not to appoint a committee. The case law has in
13 large measure developed out of cases decided in the Southern
14 District of New York, but the factors are employed throughout
15 the country. They are laid out in the Becker Industries
16 case, and in the Johns Manville case that I have cited.
17 They're also discussed in, for example, In Re: Kalvar
18 Microfilm, Inc., 195 B.R. 599 (Bankruptcy, District Court of
19 Delaware 1996), and numerous other cases throughout the
20 country. They include:

21 Whether the shares are widely held and publicly
22 traded.

23 The size and complexity of the Chapter 11 case.

24 The delay and additional cost that would result if
25 the Court grants the motion.

1 The likelihood of whether the debtors are insolvent.

2 The timing of the motion relative to the status of
3 the Chapter 11 case.

4 And other factors relevant to the issue of adequate
5 representation, including:

6 The role of the board and management acting on
7 behalf of shareholders.

8 The role of other estate-compensated parties,
9 including the Official Creditors' Committee, and whether they
10 can be said in large measure to be acting on behalf of
11 shareholders, at least insofar as maximizing the value of the
12 estate.

13 And according to some courts, the sophistication of
14 the shareholders, particularly those who have made the
15 motion, and their ability to retain counsel and other
16 advisors.

17 And according to some courts, the right of such
18 parties, if they do make a substantial contribution in the
19 case, to be compensated under Section 503(b) of the
20 Bankruptcy Code.

21 Before discussing those factors in more detail,
22 however, and particularly focusing upon the factor dealing
23 with the debtors' financial condition, which has occupied a
24 great deal of the hearing in front of me, I believe it's
25 relevant and significant also to quote the legislative

1 history of Section 1102(a)(2), because, given the lack of a
2 statutory definition of "adequacy of representation," I
3 believe congressional intent is relevant.

4 The relevant legislative history on the section is
5 not only quoted, but astutely critiqued in Johns Manville at
6 68 B.R. 155 at 160. As noted in that case, one of the
7 purposes of the legislation was, quote:

8 "-- to counteract the natural tendency of a debtor
9 in distress to pacify large creditors with whom the
10 debtor would expect to do business at the expense of
11 small and scattered public investors."

12 That's from S. Rep. No. 989, 95th Congress, Second
13 Session at 10 (1978).

14 The Congressional Report went on to state:

15 "The committee believes that it should be emphasized
16 that investor protection is most critical when the
17 company in which the public invested is in financial
18 difficulties and is forced to seek relief under the
19 bankruptcy laws. A fair and equitable
20 reorganization as provided in the bill is literally
21 the last clear chance to conserve for them values
22 that corporate financial stress or insolvency have
23 placed in jeopardy. As public investors are likely
24 to be junior or subordinated creditors or debt-
25 holders, it is essential for them to have

1 legislative assurance that their interests will be
2 protected. Such assurance should not be left to a
3 plan negotiated by a debtor in distress and senior
4 or institutional debtors who will have their own
5 best interests to look after." Id.

6 The Court in Manville noted, however, that because
7 Congress made the appointment discretionary in the Bankruptcy
8 Court, finding that the Court "may" appoint a committee if
9 necessary to assure adequate representation, it obviously did
10 not take this principle beyond the meaning of the statute.

11 I believe there has been a development in the case
12 law since the Congressional Report was issued, and, frankly,
13 since the Becker Industries case, which was one of the first
14 cases to deal with the appointment of a committee under
15 1102(a)(2), although starting, frankly, with an earlier case,
16 Judge Beatty's case in Emons Industries.

17 The Courts have recognized that even where a Chapter
18 11 case involves a substantial number of public shareholders
19 and is large and complex, the Court should not appoint an
20 equity committee if the debtor appears to be clearly
21 insolvent. That is because, in the words of Judge Beatty in
22 Emons, which appears at 50 B.R. 692 (Bankruptcy SDNY 1985):
23 to do so would, in effect, give the equity committee and the
24 shareholders a gift. And that is because the cost of the
25 committee is borne by the estate.

1 And if it appears, in the words of Emons, that
2 the debtor is hopelessly insolvent, that cost should not be
3 borne.

4 Courts, I believe, because of their experience of
5 cases where equity committees were formed, where equity
6 committees were inordinately litigious and active in such
7 cases and ultimately obtained for their constituents what
8 might charitably be described as a gift, that is, an
9 inducement to go away through a plan, have come to emphasize
10 the point. It's discussed in some detail and with some
11 candor in the Wang Laboratories decision by Judge Hillman at
12 149 B.R. 1 (Bankruptcy, District of Massachusetts 1992), in
13 which Judge Hillman recognized the need not to legitimize
14 what he called the, quote, "blackmail factor" inherent in the
15 presence of an equity committee where, in fact, it appears
16 that the debtor is hopelessly insolvent.

17 The Bankruptcy Code gives parties in interest
18 considerable access to the Court and considerable issues to
19 raise, if they choose, in front of the Court, which obviously
20 has the effect potentially of delaying the prosecution of a
21 Chapter 11 case and causing other parties to incur
22 substantial costs. The benefit to a litigant of controlling
23 an equity committee, or any other official committee, is
24 that, subject of course to Court review, the cost of such
25 litigation is borne by the estate, which raises the stakes

1 and makes it tempting to implement the "blackmail factor"
2 strategy.

3 I believe these are legitimate concerns in this area
4 and they have been recognized by numerous courts, and
5 specifically, in what I believe today to be the leading
6 decision in this area, they were recognized by Judge Lifland
7 in In Re: Williams Communications Group, Inc., 281 B.R. 216
8 (Bankruptcy SDNY 2002), in which he repeated Judge Beatty's
9 concern that an equity committee where the debtor appears to
10 be hopelessly insolvent should not be warranted because, this
11 is a quote:

12 "-- because neither the debtor nor the creditor
13 should have to bear the expense of negotiating over
14 the terms of what is in essence a gift."

15 Judge Lifland used in that quote Judge Beatty's
16 phrase, "appears to be hopelessly insolvent." He also used
17 it at Page 222 -- I'm sorry, at 221 of his opinion.

18 Interestingly, in his conclusion, however, he
19 provides for a somewhat different test than "hopelessly
20 insolvent." He states:

21 "The appointment of official equity committees
22 should be the rare exception. Such committees
23 should not be appointed unless equityholders
24 establish that (i) there is a substantial likelihood
25 that they will receive a meaningful distribution in

1 the case under a strict application of the absolute
2 priority rule, and (ii) they are unable to represent
3 their interests in the bankruptcy case without an
4 official committee." Id. at 223.

5 That is, as to the first prong of his test, it
6 requires more of the movant for an official equity committee
7 to establish than that there are signs of hope of solvency,
8 at least in the general run of such applications.

9 That formulation has since been picked up by another
10 court. Judge Case, whom I certainly respect as a very astute
11 scholar of bankruptcy law, applied the same test in In Re:
12 Northwestern Corporation, 2004 Westlaw 1077913 (Bankruptcy,
13 District of Delaware, May 13, 2004).

14 Now I say that without necessarily accepting it as
15 an ironclad test myself because I believe that all of the
16 courts that look at these issues, including Judge Lifland and
17 Judge Case, would say first and foremost that the various
18 factors enunciated by the Courts are to be applied on a case-
19 by-case basis, in light of the statute and the congressional
20 policy. And that's what I have done in my balancing analysis
21 of all of the factors; that is, I have not imposed upon the
22 movant here the burden of showing "a substantial likelihood
23 that it will receive a meaningful distribution in the case."

24 I do that because this motion is filed early in the
25 case, as opposed to at the time a plan is to be negotiated

1 and/or litigated at confirmation. And I believe that it is,
2 as a result, important for me to give the benefit of the
3 doubt to the movants here.

4 As the debtors have acknowledged candidly, it is too
5 early to formulate a business plan. It is, consequently, too
6 early to formulate a going concern valuation with any
7 credibility; and, finally, it is too early to negotiate a
8 chapter 11 plan. Consequently, all of the analysis of
9 solvency or insolvency here has around it a substantial
10 amount of speculation and doubt. And I believe it would be
11 unfair to impose upon a movant in that context the burden of
12 doing a full-scale going-concern valuation to show a
13 "substantial likelihood of a meaningful distribution."

14 Moreover, I believe that such a full-blown valuation
15 at this time is not what is called for in connection with a
16 motion for the appointment of an equity committee. As Judge
17 Lifland made quite clear in Williams, this is a summary
18 proceeding. The valuation that the Court performs in
19 connection with the proceeding is not binding in any respect
20 on any party with respect to any future valuation of the
21 debtor or its assets, including, most importantly of course,
22 a valuation for chapter 11 plan confirmation purposes.

23 There's an obvious reason for that. It's tied into
24 both the strengths of Congressional policy in permitting
25 equity committees to be appointed under the proper

1 circumstances as well as the potential for abuse of that
2 right; that is, on the one hand, it's unfair to impose the
3 burden of a full-scale valuation on public shareholders in
4 all circumstances, although the burden may be increased in
5 certain circumstances. It is also unfair to the debtor and
6 the other parties whose money is very clearly at risk in the
7 bankruptcy case, namely the creditors, and in this case the
8 workers, of, in essence, causing the motion for the
9 appointment of an equity committee to take over the entire
10 case so that under the rubric of "valuation" the movant for an
11 equity committee can use all of the cost and delay leverage
12 that an equity committee might have even before the equity
13 committee is appointed, to engage the parties in litigation
14 on the merits of the key issues in the case.

15 That would be an absurd result. I believe, frankly,
16 that's why I was so angry at Appaloosa's attempt repeatedly
17 to turn this matter into such a proceeding and why the case
18 law is crystal-clear that that is not what the Court is to
19 consider.

20 Now let me -- before that, let me note that although
21 Judge Lifland makes that crystal-clear in his opinion, he's
22 not the only judge to have done so. In fact, Judge Case in
23 Northwestern didn't have an evidentiary hearing at all. He
24 did not believe it was appropriate. The Court in Leap
25 Wireless, 295 B.R. 135 (Bankr. S.D. Cal. 2003) was frustrated

1 as to the lack of substance behind the debtors' schedules,
2 but, again, only treated the matter as a summary proceeding
3 and took whatever evidence she had and weighed that into her
4 analysis with respect to whether a committee should be
5 appointed.

6 So I believe, both logically and under the case law,
7 there is no basis to expand the inquiry that I need to
8 undertake here to force parties to conduct full-blown
9 valuations on either side of the solvency issue.

10 Now, to apply the various factors. As I noted
11 before, this is a large public company. There's over 500
12 million of issued and outstanding common shares and over
13 300,000 public shareholders. This is obviously also a large
14 and complex bankruptcy case. The docket is already
15 substantial, and it is clear to me that far more than is
16 reflected in the docket is being done by the debtor and other
17 parties behind the scenes in respect to resolving the key
18 issues in this case.

19 Those issues are complex, both in terms of the
20 negotiating and human dynamics, as well as the qualitative
21 and quantitative analysis in regard to the underlying
22 documentation, the parties' rights under the Bankruptcy Code
23 and other law, including labor law and ERISA; and they
24 ultimately involve numerous important judgment calls that in
25 the first instance the debtor must make in consultation with

1 key constituencies in the case, and that ultimately I must
2 make when the debtor goes to seek approval of what it has
3 negotiated. So those factors clearly call for the
4 appointment of an equity committee.

5 It is also argued that the debtors' management and
6 board is not actually representing the interests of the
7 shareholders as well as those of all of the other
8 constituencies for which they are fiduciaries; and, to some
9 extent, it is argued that they cannot represent those
10 interests.

11 As to the latter point, to the extent it's made, I
12 do not accept that analysis. Clearly, the board of a public
13 company and its management owes a duty in a bankruptcy case
14 not only to the creditors, assuming that the debtor is
15 insolvent, but also to the shareholders. And there is no
16 built-in bias there against shareholders. As noted by Judge
17 Robinson in Edison Brothers Stores, 1996 Westlaw 534, 853
18 (District Court of Delaware, 1996), a movant needs to show
19 more than simply speculation as to such a conflict.

20 It's additionally argued that the very fact of the
21 complexity of this case and the debtors' natural desire to
22 resolve the case may lead the debtor to give short shrift to
23 shareholders' views. That, I believe, has some merit to it;
24 and, frankly, the argument is, I believe, consistent with the
25 legislative history that I quoted earlier.

1 That's particularly the case here where there truly
2 are extremely difficult negotiations that the debtors must go
3 through. And I believe that it is important for the debtors
4 to be fortified in those negotiations by the views of key
5 constituencies. I believe that has occurred with regard to
6 the Creditors' Committee, as is reflected, I believe, by the
7 constructive relationship between the Creditors' Committee
8 and the debtors that I've viewed in this case. I say
9 "constructive," rather than "hand-in-glove" because it is very
10 clear to me that the Creditors' Committee is nobody's patsy
11 by any means and makes its views known to the debtor very
12 clearly and forcefully, even if those views are unwelcome.

13 It's not particularly clear to me that that same
14 voice has been expressed by the shareholders. Partly, that
15 is the fault of the shareholders, at least the sophisticated
16 ones. For example, I am shocked that Appaloosa made this
17 motion and sent the threatening letter to the board that it
18 sent asserting the allegations that it made without once
19 communicating with the debtor. And I'll return to that
20 later.

21 But Appaloosa, as Mr. Lauria stated, should not
22 really be the focus of a motion to appoint an official equity
23 committee, although Appaloosa's problems may be the focus of
24 who the U.S. Trustee appoints to a committee.

25 Now Appaloosa also alleges that there are actual

1 conflicts over and above the debtor's tendency in a very
2 large and difficult case not to reach out to a constituency
3 that has not reached out to it. Again, I have a hard time
4 seeing that. I certainly do not see a level of actual
5 conflict at the level alleged by Appaloosa in what I again
6 believe was irresponsibly loose language.

7 There are really two bases for Appaloosa's
8 allegation.

9 The first is that because at the start of these
10 cases the debtors proposed what I feel free in calling a
11 generous KECP package that included an allocation of post-
12 reorganization equity to post-reorganization management, the
13 debtors' management--and to the extent the board approved the
14 KECP, the board--believes that management's interests are
15 different than shareholder interests. I note, however, and
16 this, frankly, was obvious to Appaloosa, or at least should
17 have been, that that motion has been repeatedly adjourned and
18 tabled pending further negotiations with the creditors
19 committee, which as I said is nobody's patsy, and secondly,
20 is subject ultimately to my approval.

21 I also note that, traditionally, provisions for
22 allocation of post-reorganization equity for management are
23 dealt with in a plan that is voted upon by those entitled to
24 vote, and, generally, that is done because those entitled to
25 vote then see how they're being diluted. Generally,

1 notwithstanding some cases where shareholders recover
2 something in respect of their old equity, the major issuance
3 of post-reorganization equity in chapter 11 cases goes to the
4 creditors, and they are the ones who are usually most diluted
5 by such management incentive plans in respect of post-
6 reorganization equity. In other words, I believe Appaloosa's
7 argument on this point is miscast and at best irrelevant and
8 I believe, again, almost willfully so.

9 Secondly, Appaloosa argues that the debtors' very
10 opposition to this motion shows that the debtors' management
11 and board have an actual conflict in representing the
12 interests of the shareholders, primarily because the debtors
13 have stated that for purposes of this motion, at this time,
14 they are clearly or hopelessly insolvent. The debtors'
15 objection to the motion, to the contrary, is clearly in good
16 faith. As Mr. Sheehan and Mr. Resnick testified, the
17 debtors' goal is to maximize value for all constituencies. I
18 might understand why an unsophisticated shareholder who did
19 not understand the limited issues and inquiries relevant to a
20 motion under section 1102(a)(2) might make the argument, but,
21 knowing Appaloosa's sophistication, I find this "actual
22 conflict" argument to be rhetoric.

23 As to the timing factor, because of the very serious
24 issues that the debtors are dealing with in these cases,
25 going to the heart of their business, this is to me obviously

1 not a simple balance sheet restructuring where the capital
2 structure simply needs to be adjusted because there's too
3 much funded debt on the books.

4 There are serious -- to use the debtors' phrase
5 "transformational issues" that have to be resolved here.
6 Because of that, I believe that this is the appropriate time
7 to move for an equity committee, and not to wait until later
8 in the day when a plan is actually being negotiated.

9 I also believe as a corollary to that, the function
10 of the equity committee and the makeup of its professional
11 advisors should be reflected by this timing. As I'll say
12 later, again, I think this leads to the conclusion that
13 although it's not before me, except in my need to weigh the
14 cost of an equity committee's appointment, that it's unlikely
15 that I would approve the retention of investment bankers and
16 accountants or even actuaries at this time for an equity
17 committee, since those functions are not really the functions
18 that need to be performed at this time by an equity
19 committee.

20 So that in contrast, while in the Loral case I
21 believe that it was incumbent to have an equity committee, if
22 at all, towards the end of the case, here, I believe if it is
23 incumbent on there being an equity committee, this is the
24 time to have one formed.

25 It is even conceivable to me that if I did form an

1 equity committee now and it turned out that ultimately I
2 approved interim transformational solutions --
3 transformational solutions to the labor and related pension
4 and GM problems that the debtors face--it might be
5 appropriate to disband the equity committee because, in light
6 of those solutions, it might appear clearly at that time that
7 the debtor was hopelessly insolvent or at least that it was
8 likely that there would be no distribution to shareholders.

9 But because of the importance of those pending
10 issues, one could at least see a rationale for having an
11 equity committee with counsel in the near future to deal at
12 least with those transformational issues on behalf of the
13 shareholders.

14 Now, as far as whether the debtor is insolvent or
15 hopelessly insolvent or there is a likelihood of a meaningful
16 distribution to shareholders, I am at this time on this
17 record frankly skeptical that there will be a meaningful
18 distribution, but I'm not prepared to rule it out. I say
19 that for a number of reasons.

20 First of all, it's undisputed that on a balance-
21 sheet basis, and it is correct that the movants' experts did
22 not disagree that on a balance sheet basis, the debtors'
23 operating -- most recent operating numbers comply with GAAP,
24 there is roughly a 6.3-billion-dollar hole, or insolvency.

25 The question, obviously, is how does one fill that

1 hole or bridge that gap?

2 Although Appaloosa's experts made some effort to do
3 it on the asset side, my review of their analysis is that
4 they have not in any meaningful respect convinced me on the
5 asset side of the balance sheet or in their going-concern
6 value, their enterprise value before deductions, that they
7 have -- they have established a credible case to do so.

8 When you really boil it down, giving the benefit of
9 the doubt to why and how the admitted one-billion-two-dollar
10 -- two-hundred-million-dollar error was corrected by Eureka,
11 what Eureka did was essentially look at the debtors' 2005
12 actual performance and annualize the debtors' actual
13 performance for the first 115 days of 2006 for an EBITDA
14 figure that they then multiplied by two different multiples.

15 I believe Mr. Sheehan's testimony as to why,
16 particularly in respect of the annualization of the first
17 quarter of 2006, Eureka's process was materially if not
18 perhaps fatally flawed, in respect of the Eureka expert's
19 analysis of why the debtors did better in the first quarter
20 of 2006 and what the debtors' properly projected earnings
21 should be.

22 Clearly, to me, Mr. Sheehan's explanation of the
23 debtors' analysis of their projected business with GM and the
24 reason for the potential front-loading of income in 2006 was
25 credible and accounted for the difference between the

1 bottoms-up projections that the debtors did and the
2 effectively back-of-the-envelope calculation that Eureka did
3 in respect of EBITDA, and I say "back of the envelope"
4 because, frankly, given the billion-two error on its March
5 10th report, that's all Eureka was really left with: applying
6 a multiple to 2005 and the first quarter actual numbers of
7 2006 without proper analysis of why those figures can be
8 relied upon as the basis for projected EBITDA.

9 I do recognize, however, that Mr. Sheehan
10 acknowledged that it is possible that the debtor's balance-
11 sheet numbers on the asset side might be higher. It's my
12 experience, and I think most people's experience who've dealt
13 with Chapter 11 debtors for a lengthy period, that that's
14 hardly ever the case. Almost invariably, the balance sheet
15 overstates the assets, but that's Mr. Sheehan's belief, and
16 he has clearly been through an intensive analysis of the
17 business on a bottoms-up basis and I accept his statement.

18 Now, on the balance sheet liability side, which is
19 most -- where most of the dispute arises, I've considered the
20 testimony of Messrs. Reese and Williams. And, frankly, I
21 believe that it's very hard on the record to find any exact
22 number as far as what would be the appropriate net savings in
23 respect of OPEB liabilities after the debtors resolve their
24 transformational issues.

25 Clearly, Appaloosa's argument that the OPEB

1 liabilities go away because the collective bargaining
2 agreements go away in 2007 is -- well, it's almost laughable.
3 The unions aren't going away, and the employees aren't going
4 away without being paid for giving up those rights or having
5 them reinstated in some form.

6 So all the parties recognize that there is a price
7 to resolve those liabilities, including Appaloosa. The issue
8 is how much of a price has to be paid and how much of a
9 savings can the debtors generate. I find it hard to believe
10 that despite all of their efforts and all of an equity
11 committee's efforts, there will be a material recovery for
12 shareholders in light of those OPEB negotiations, but the
13 company doesn't preclude it as a possibility. There are
14 scenarios in which it could occur. That's agreed to by both
15 sides in this proceeding.

16 And, therefore, while Eureka's March 10th report, as
17 corrected for the billion-two error, still shows on even the
18 most optimistic basis a two-hundred-and-thirty-four-million-
19 dollar insolvency hole, given the huge amounts at stake here
20 in respect of the labor negotiations--and we're talking about
21 potential savings of billions of dollars, I know it's hard to
22 believe it, but \$234 million may not be that big of a gap, at
23 least on today's record.

24 I also looked, of course, as Judge Lifland did and
25 Judge Hillman did and other courts have done in connection

1 with motions under 1102(a)(2), at the trading prices of the
2 debtors' securities when evaluating the debtors' solvency.

3 It's common knowledge that the market in distressed
4 debt and to some extent distressed stock, but more -- more
5 the case of distressed debt, is large, indeed, huge, and
6 active, particularly with respect to public companies such as
7 Delphi. That is reflected among other things by the numerous
8 Wall Street analysts' reports covering the debt introduced
9 here.

10 There's uncontroverted evidence that Delphi's public
11 debt has consistently traded since the petition date at or
12 below sixty cents on the dollar. The courts at times have,
13 although not accepting as controlling the trading prices of
14 debt securities, consistently looked at trading prices in the
15 debtors' securities as a indication in this type of summary
16 proceeding of value.

17 Courts obviously know, at least this Court knows,
18 that people engage in a market because they're making various
19 bets on the value of securities. Some are betting that it's
20 a good idea to sell, and some are betting it's a good idea to
21 buy. Generally, it's an active market; and, generally,
22 active markets are a good indication of value because there
23 are both buyers and sellers at reasonably arm's length
24 bargaining positions.

25 However, of course, those markets are not guarantees

1 of value. That's why some analysts get fired and some get
2 promoted. Market security trading price indicators are most
3 telling where they're quite low, where they're in my
4 experience below or well below fifty cents on the dollar,
5 particularly in respect of cases that are in all likelihood
6 going to be resolved one way or another in a fairly short
7 term, and, in the life of a chapter 11 case of a large
8 company, fairly short term is around a year.

9 It's clear to me and it's been clear from the start
10 of these cases that although the debtors are pushing these
11 cases, appropriately so, as fast as they can, this is a
12 longer term process. They project emergence from bankruptcy
13 in 2007, although they are doing everything they can to
14 emerge sooner than that.

15 Given that, I am not particularly moved either way
16 by the trading ratios or prices. Mr. Lauria is correct that
17 anyone buying distressed debt is looking for a large return
18 to make up for the risk, particularly where the debt is
19 unsecured, and so it's conceivable that a sixty-percent-on-
20 the-dollar level, while obviously not suggesting solvency,
21 may indicate at least a hope of solvency.

22 This is, for example, different than the trading
23 levels in Loral, which were considerably lower, or in
24 Williams, which were at 15% to 6% of face value.

25 So, all things considered, in respect of the

1 solvency analysis, at this point in the case, I cannot find
2 that appointing an equity committee would be a gift. On the
3 other hand, I am very mindful of the cost to these estates of
4 an equity committee.

5 Some cost clearly is legitimate. The whole reason
6 you have an equity committee is that the estate bears the
7 cost. On the other hand, the way that this litigation has
8 been conducted, I mean this litigation in front of me right
9 now, by Appaloosa, gives me very serious pause as to whether
10 the cost ultimately will be appropriate in this case.

11 Now, Appaloosa says I can regulate that by looking
12 at fee applications and the like, but, to some extent, once
13 an equity committee is appointed the cat is out of the bag,
14 and so I have thought very long and hard about whether the
15 cost factor here should lead me not to appoint a committee.

16 I can say this, that I will look very carefully at
17 fee applications of any counsel that is chosen to represent a
18 committee. I also will look very carefully at whether the
19 continued incurrence of fees is appropriate at various stages
20 in the case where the picture on valuation becomes clearer.

21 But, ultimately, standing alone, as I do believe
22 that I can perhaps with the help of the United States Trustee
23 control costs, the costs alone are not in my mind
24 dispositive, although they are a major factor here calling --
25 arguing that I should not appoint a committee.

1 The last point which is raised by some courts, it's
2 specifically raised by Judge Case in the Northwestern
3 opinion, is that at least Appaloosa went into this bankruptcy
4 case with its eyes wide open. Judge Case thought that was a
5 clear factor calling for denial of the motion. And of course
6 the ability of certain shareholders to fund their own
7 professionals also is clearly a factor arguing against a
8 committee. See Williams, 281 B.R. at 223.

9 If this were a relatively small pool of
10 shareholders, I would -- I would obviously do the same. I
11 don't think the fact that Brandes has joined in the motion
12 particularly helps Appaloosa's cause, because Brandes is
13 obviously very well-heeled, very sophisticated and is well
14 represented by another large national firm with a bankruptcy
15 practice.

16 However, I go back to the first point I made. There
17 are over 300,000 shareholders here. Given the rapid change
18 in their fortunes from June of 2005 to today, it's fair for
19 me, I think, to assume that some of them may be in the
20 investor equivalent of a state of shock or disbelief and that
21 that's why they're not showing up here today.

22 It seems to me, again, that given the important
23 transformative events that will be taking place in this
24 company through this bankruptcy case over the next few
25 months, it's important to give those people representation,

1 and if a committee is formed that adequately represents them,
2 then I think that they're entitled to it within the
3 parameters that I've already described.

4 Now, in discussing or mentioning the abrupt changes
5 that have taken place in the fortunes of this company, I do
6 not want to suggest, as Appaloosa, I think, has, that the
7 company has done something over the last several months
8 between June of 2005 and today or even between June of 2005
9 and October when it filed for bankruptcy that is somehow
10 nefarious or improper in respect of its business or its
11 shareholders.

12 I think it's irresponsible to suggest that.
13 Clearly, this company has extremely difficult problems to
14 resolve. To suggest that it should have spent all of its
15 cash on hand before filing to resolve those problems, to
16 suggest that it should continue with the steady-state
17 projections, which even Appaloosa recognized would lead to
18 the destruction of the debtors' business is absurd and was
19 truly a waste of this Court's time, and, frankly, for those
20 who are not particularly sophisticated and read such
21 allegations in the press, again, Appaloosa's argument or
22 insinuation in this regard was a truly irresponsible attack
23 on the company.

24 So I will order the appointment of an official
25 equity committee. I'm going to be very clear as to the -- my

1 expectation as to at least the -- my initial reaction to a
2 request by that committee for retention of professionals.

3 I do not believe that the proper functioning of a
4 committee of equityholders at this time calls for the
5 appointment and retention of investment bankers, accountants
6 or actuaries, and a premise -- a fundamental premise of my
7 ruling is that I would not appoint such parties,
8 professionals at this time.

9 What an equity committee needs to do is to
10 understand through its own members' expertise, and I trust
11 that there will be sophisticated parties like Brandes on the
12 committee, and through the assistance of its counsel, the
13 pressing issues of this case in respect of labor, pension,
14 other benefits and GM.

15 It needs to be informed, it needs to give the debtor
16 its views so that they can be taken into account as the
17 debtor proceeds.

18 To the extent that it feels it needs to do due
19 diligence on actuarial assumptions, I believe an appropriate
20 arrangement can be worked out with regard to using the
21 creditors committee's actuaries.

22 I do not expect an equity committee or its
23 professionals to try to inject themselves into the extremely
24 sensitive negotiations that are ongoing between the debtors,
25 the unions, GM and other parties in the labor transformation

1 issue process.

2 They should be able, however, again, to communicate
3 their views to the debtor and be able to be reasonably
4 informed as to the process so that they can make a
5 determination as to whether to oppose or support it whenever
6 an agreement is brought to the Court.

7 It's very clear that one function of a committee may
8 require the committee at times to take an adversarial role in
9 a case. However, I believe that consistent with all the case
10 law that I've just cited, it is not proper for an equity
11 committee to view its job as one to create leverage by being
12 a thorn in everyone's side.

13 If the equity committee is not engaged in a two-way
14 dialogue with the debtor, I will believe, and I will act on a
15 motion that contends that, the committee is dysfunctional and
16 disband it.

17 I will also look very closely, and I know that the
18 United States Trustee will look very closely, at any
19 suggestion that the equity committee is taking action in
20 court or otherwise not to maximize recoveries for all
21 committee constituents, but instead to artificially pump up
22 the value of the current stock on a trading basis.

23 I am very concerned about the potential that that
24 has already happened in this case--not by an official
25 committee and obviously not by an equity committee, because

1 one has not been appointed, but by parties involved in this
2 litigation, and I will look at the facts closely, and I've
3 already looked closely at the facts of the apparent release
4 of confidential information.

5 And, having looked at those facts, I continue to
6 have serious questions about that apparent release, and if,
7 in fact, Appaloosa applies to be a member of this committee,
8 I direct the U.S. Trustee to investigate those facts.

9 In short, the equity committee needs to be
10 responsible in looking after the interests of the equity-
11 holders as a group, and I trust it will do so.

12 So, Mr. Lauria, you can submit an order to that
13 effect.

14 COUNSEL: Thank you, Your Honor. Thank you, Your
15 Honor.

16 THE COURT: Thank you.

17 (Proceedings concluded at 7:17 p.m.)

18 CERTIFICATION

19 We certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter to the best of our
22 knowledge and ability, except where, as indicated, the Court
23 has modified its bench ruling.

24 _____ March 23, 2006
25 Coleen Rand
Certified Court Transcriptionist/Agency Director
Rand Transcript Service, Inc.

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March 23, 2006

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Jennifer Linnartz
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